No. 84-1224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITIONER'S REPLY BRIEF

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Petitioner respectfully files this reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari.

I. REJECTION OF PETITIONER'S *EX POST FACTO* CLAIM WAS BASED ON FEDERAL LAW AND WAS IMPROPER

The gist of respondent's argument that Petitioner (also referred to hereinafter as "Evans") did not suffer a violation of the *ex post facto*, equal protection, and due process clauses of the United States Constitution is that the Virginia Supreme Court has the last word in this case, citing *Garner v. Louisiana*, 368 U.S. 157, 166

(1961). Opposition ("Opp.") 4-5, 7-10, 14. Under *Garner*, this Court is bound by a "State's interpretation of its own statute . . . ." *Id.* at 166. Because the issues Evans presents in his petition do not rest on an interpretation of a state statute, *Garner* is not applicable to the petition.[1]

Respondent blatantly misrepresents[2] the Virginia Supreme Court's holding in *Evans II*[3] by claiming that the court below decided "how the *Patterson* case and the former version of § 19.2-264.3 would have affected petitioner's case." Opp. 5. It did no such thing. The Virginia Supreme Court in *Evans II* reached its decision by analyzing and seeking to apply United States Supreme Court opinions to the facts of Evans' case. *See* App. 5a-7a. The Virginia Supreme Court in *Evans II* did not

[1] *See Michigan v. Long*, 103 S. Ct. 3469, 3476 (1983) ("when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so"); *California v. Ramos*, 103 S. Ct. 3446, 3451 n.7 (1983) (state supreme court's opinion clearly rested solely on federal constitution so no bar to review); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (state "court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did;" opinion below therefore reviewable); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940) ("ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action").

[2] Among other flagrant mischaracterizations, respondent's quotation of the Virginia Supreme Court's holding on the *ex post facto* issue, which purports to paint Evans' claim as one resting on state law, omits through an ellipsis the essence of Evans' argument that resentencing him violated the United States Constitution. (*Compare* Opp. 5 (respondent's excerpts) *with* App. 5a (the actual Virginia Supreme Court opinion)).

[3] *See* App. 1a-15a.

attempt to interpret the *Patterson* case, the superseded capital punishment statute, or the Virginia state constitution in reaching its decision. Thus, respondent is seeking to preserve the opinion below behind an altogether inapposite jurisprudential shield.[4]

Notwithstanding respondent's effort to fit the present case into *Dobbert v. Florida*, 432 U.S. 282 (1977) and other authority on the *ex post facto* clause, respondent is not able to cite a single case in which a statutory scheme in place at the time of trial was replaced by a more severe scheme, and then applied retroactively. Moreover, *Dobbert* was misapplied below because the statutory amendment was neither "procedural"—it deprived Evans of his right to have the guilt-phase jury also decide his sentence—nor "ameliorative"—in contrast to the facts in *Dobbert*, here Evans would have had his sentence reduced under the prior statute had respondent disclosed its errors to the Virginia Supreme Court during Evans' direct appeal. Respondent's ultimate answer to these points is that certiorari should be denied because the Virginia Supreme Court disagreed with Evans.[5] This Court must

[4] If respondent's view of the law were correct, no state high court ruling would be subject to review by the United States Supreme Court. For example, under respondent's purported principle of appellate review, this Court could not have decided *Furman v. Georgia*, 408 U.S. 238 (1972), because the Georgia Supreme Court had held that the state's death penalty statute was constitutional. Such a contention regarding the finality of a state high court's interpretation of a state statute is obviously unfounded.

[5] A similar effort by respondent (*see* Opp. 5-6) to defeat Evans' arguments on purely technical grounds—Evans' asserted failure to raise below an issue raised in his petition—is also unavailing. Evans argued below that under the *ex post facto* clause he was entitled to a life sentence (Opp. Appendix 6), and that is precisely his contention here. (Ptn. 10.) Respondent confuses Evans' claim that he was denied the right to have the same jury that heard the guilt-phase evidence also determine his sentence with his claim that he had a right to receive an automatic life sentence pursuant to

make clear that states may not tread upon the *ex post facto* clause in the manner at issue here, nor may they do so without subjecting their actions to the scrutiny of this Court.

II. UNDER FEDERAL EQUAL PROTECTION LAW, WHICH WAS THE SOLE BASIS FOR THE OPINION BELOW, PETITIONER'S SENTENCE SHOULD HAVE BEEN REDUCED TO LIFE IMPRISONMENT

Respondent's equal protection argument, also relying heavily on *Garner v. Louisiana*, seeks to preclude review by this Court merely because the Virginia Supreme Court decided the equal protection issue adversely to petitioner. Opp. 9. Respondent's argument is no more persuasive here than it is regarding the *ex post facto* issue.[6] The court below, in rejecting petitioner's equal protection argument, did so based solely on its interpretation of *Dobbert*. It did not interpret one bit of Virginia law to reach its conclusion. This Court, not the Virginia Supreme Court, has the last word on whether the equal protection clause of the United States Constitution was violated.

Respondent does not deny that its trial counsel knowingly used false conviction records to persuade the jury to sentence Evans to death. It defends its continued reliance on the false records before the Virginia Supreme Court (in opposition to Evans' direct appeal) and in a

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Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981). *See* Opp. 5-6. Evans' position is, and has always been, as follows: First, the same jury that determined his guilt should also have determined his sentence. Second, *Patterson* made clear that when a sentencing jury became tainted, Evans could not be resentenced by the tainted or any other untainted jury, and instead had an immediate right to a court-imposed sentence of life imprisonment. 222 Va. at 660, 283 S.E.2d at 216.

[6] Indeed, in support of its effort to preclude review of the equal protection issue, respondent cites to a section of the Virginia Supreme Court's opinion below (App. 4a-5a) which is addressed exclusively to the *ex post facto* issue.

brief to this Court (in opposition to Evans' initial petition for a writ of certiorari), however, by arguing that the particular prosecutor at the appellate level who made these false representations was not aware, as was his trial prosecutor colleague, that they were false. Opp. 9 n.6. Respondent would have this Court hold that the state can free itself of the prejudicial error of one of its prosecutorial agents in a particular case (indeed, in a death penalty case) merely by the fortuity of assigning the appellate phase of the case to another prosecutorial agent who was unaware of the prejudicial error. Such an argument offends any sense of fundamental fairness and was long ago rejected by this Court. In *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that a prosecutor's office is one entity. Prosecutors' offices have the responsibility to see that all relevant information on each case is communicated to every lawyer who deals with the case at any stage. *Id.* at 154. In *Santobello v. New York*, 404 U.S. 257 (1971),[7] the Court observed that the "staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' *or has done*." *Id.* at 262 (emphasis added). In the present case, fundamental fairness requires that one prosecutor's knowledge that he used false conviction records to obtain the death penalty must be imputed to a colleague who is seeking to have the sentence affirmed on appeal. Ignorance of the error by the state's appellate counsel is no defense when its trial counsel was well aware of the dimensions of the misrepresentation.[8]

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[7] In *Santobello* the prosecution was held bound by an agreement made with a defendant by one prosecutor, even though the case was later handled by a second prosecutor unaware of the agreement. 404 U.S. at 262-63.

[8] The trial attorney who made the knowing misrepresentation was aware that the Virginia Supreme Court relied on the false conviction records in its opinion affirming Evans' death penalty. App. 55a-56a. He did nothing to alert other members of his office—or the court—to the error. As long ago as *Mooney v. Holohan*,

Respondent's final effort to preserve the result below is to argue, without any citation to precedential authority, that "it was entirely consistent with *Dobbert* to apply to Evans the law which was in effect at the time his death sentence was set aside and at the time of his resentencing proceeding." Opp. 13. Whether respondent's delay in confessing error was purposeful or not, the fact remains that under the law in effect from the commencement of Evans' trial until two years thereafter, respondent's knowing use of false conviction records would have resulted in an *automatic life sentence but for respondent's delay in confessing error.*[9] To draw a line between the defendant in *Patterson*, whose death sentence was reduced to life because the Virginia Supreme Court was alerted to the error related to his sentencing, and Evans, whose death sentence was not reduced because respondent compounded its error by misleading the Virginia Supreme Court in addition to the jury, is to undermine totally the significance of the equal protection clause as interpreted in *Dobbert*.

Consider what would have happened had respondent timely confessed error and thereby enabled Evans in his

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294 U.S. 103 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." *Id.* at 112. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269.

[9] Evans did not allege in his petition, as respondent contends, that "respondent purposefully delayed resolution of his habeas corpus proceedings so that his original death sentence would not be set aside until after the statutory amendment became effective." Opp. 9 n.6. In his petition Evans merely set forth the chronology of events and noted that in June 1982 respondent was challenged about its use of false evidence but that respondent did not confess its undisputed error until April 1983, two weeks after the emergency legislation was enacted.

original petition for a writ of certiorari filed with this Court (in February 1982) to call respondent to task for its use of the false conviction records? There can be little doubt that if respondent timely had admitted its error, Evans' death sentence would have been reduced in light of *Patterson*. Respondent is therefore rewarded by its failure to disclose timely its error if Evans' death sentence is permitted to stand. The Court should not tolerate such a result.

III. DUE PROCESS REQUIRED AN ACCURATE INSTRUCTION TO THE JURY THAT NONUNANIMITY AT THE SENTENCING PHASE WOULD RESULT IN A LIFE SENTENCE

As a matter of fundamental fairness and due process, Evans had a right to an instruction that if the jury was not unanimous as to the death sentence, nonunanimity would result in a life sentence. This was not solely a matter of Virginia law;[10] it implicated federal due process constitutional issues as well. When a death penalty statute, as here, makes specific provisions for a life sentence in the event of a nonunanimous jury,[11] and the jury is not so advised when it asks specifically about the consequences of nonunanimity, the defendant has been denied his federal due process right to have a jury fully

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[10] Respondent contends that under Virginia law, the verdict in criminal prosecutions must be unanimous. Opp. 13. This is true insofar as guilt or innocence is concerned, (*see* Virginia Code § 19.2-264.4(D) (1983) (verdict in all criminal prosecutions must be unanimous)), but neither the Virginia Supreme Court nor respondent cites any authority that would read this requirement applicable to death penalty proceedings, which are not themselves considered separate "prosecutions."

[11] When the jury asked whether a decision for life had to be unanimous, the trial court failed to advise the jury that Virginia law provided that if the jurors could not achieve unanimity, "the court shall dismiss the jury, and impose a sentence of imprisonment for life." Virginia Code § 19.2-264.4(E) (1983).

and accurately apprised of the governing law.[12] To paraphrase this Court's opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), the failure to give the jury the option of nonunanimity inevitably enhances the risk of an unwarranted death sentence. *Id.* at 637.[13] "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* Such a denial of due process plainly may be, and should be, reviewed by this Court.

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[12] *Cf. Beck v. Alabama*, 447 U.S. 625, 638 (1980) (statutory prohibition on giving lesser included offense instructions in capital cases violates due process clause by substantially increasing the risk of error in the factfinding process).

[13] *Cf. Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

CONCLUSION

Respondent continually refers to the Virginia Supreme Court as "the final arbiter of Virginia law" (Opp. 5, 8, 10, 14), but such a characterization is irrelevant when it is precedent of this Court, not Virginia law, that was interpreted below. The *ex post facto* and equal protection issues raised in this case have broad implications for prisoners on death row throughout this country. This Court should provide guidance to state courts about how, given the variety of new death penalty statutes and the variations in timing that inevitably occur, the new statutes should apply to inmates tried under superseded statutes. The Court should also clarify the responsibility of trial judges to instruct juries accurately about the consequences of nonunanimity at sentencing in capital cases. For these reasons, petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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